No. 10279

United States
Circuit Court of Appeals
For the Ninth Circuit.

CUMMER-GRAHAM COMPANY, a corporation,
Appellant,

vs.

STRAIGHT SIDE BASKET CORPORATION,
Appellee.

Reply Brief of Appellant

Upon Appeal from the District Court of the United States for the District of Idaho Southern Division

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WHAT THE OPENING BRIEF ESTABLISHED

The opening brief established:

I. Where there is a discrepancy or uncertainty in the facts, the position most favorable to the party against whom the summary judgment is sought to be entered must be accepted as true.

II. The doing of business in a state without qualifying as a foreign corporation does not constitute a waiver of the right to object to improper venue in an action brought to enforce a contract not made in and not to be performed in said state.

III. Defendant was not doing business in Idaho at the time the alleged claim arose or at the time of the commencement of the action.

IV. Service was not properly made upon defendant.

WHAT THE APPELLEE'S BRIEF FAILED TO DISCUSS

1. Plaintiff's brief does not even discuss the first of the above points. The nearest it comes to mentioning it is the statement found on page 14 to the effect that the *propriety* of the summary judgment was questioned followed by a statement as to the pleadings and the taking of depositions. The first point has not been overthrown.

2. The fourth point is not met squarely. The argument of the opening brief (pp. 35, 36) was that under the Idaho Code in an action against a foreign corporation, the doing of business was a necessary element before any service could be made upon anybody. A great part of plaintiff's brief is directed toward establishing that

the defendant's sales manager, C. H. Kinney, was a proper person upon whom to make service. The opening brief did not controvert such principle. The whole argument in the opening brief (pp. 35 and 36) with reference to that issue was that nobody was a proper person because defendant was not doing business in Idaho. The portion of plaintiff's brief directed to the importance of C. H. Kinney's position is beside the point and will not be here discussed. The issue on the fourth point established in the opening brief depends not upon C. H. Kinney's status but upon whether or not defendant was doing business in Idaho. The answer to the third point therefore answers the fourth point.

THE ISSUES LEFT TO DISCUSS

This leaves the issues as follows:

1. Does the doing of business in a state without qualifying as a foreign corporation constitute a waiver of the right to object to improper venue in an action brought to enforce a contract not made in and not to be performed in the state?

2. Was defendant doing business in Idaho?

PLAINTIFF FAILS TO ANSWER THE ARGUMENT OF THE OPENING BRIEF WHICH ESTABLISHED THAT THE DOING OF BUSINESS IN A STATE WITHOUT QUALIFYING AS A FOREIGN CORPORATION DOES NOT CONSTITUTE A WAIVER OF THE RIGHT TO OBJECT TO IMPROPER VENUE IN AN ACTION TO ENFORCE A CONTRACT NOT MADE IN AND NOT TO BE PERFORMED IN THE STATE.

The only argument of plaintiff's brief on this point is on page 42 and is that *Old Wayne Life Assn. v. McDonough,* 204 U.S. 8, 22; 27 S. Ct. 236, 51 L. Ed. 345, referred to on page 17 of the opening brief had been distinguished and qualified. The argument on page 16 of the opening brief with reference to the rule of *In re Keasbey and Mattison Co.,* 160 U.S. 221, 231; 16 S. Ct. 273, 40 L. Ed. 402, was not referred to in plaintiff's brief and it may therefore be considered that such rule is in effect except where under the rule of *Neirbo v. Bethlehem Ship Building Corp.,* 308 U.S. 165; 60 S. Ct. 153, 84 L. Ed. 167, there has been an *express* appointment, which in this case there has not been. The failure of plaintiff to overthrow the rule of the *Keasbey* case is in itself sufficient to require the reversal of the judgment below.

Furthermore, plaintiff misconceives the effect of the cases cited on page 43 of its brief which it states distinguish and qualify the *Old Wayne* case. Lower United States courts and the Supreme Court of South Carolina cannot on a question relating to venue in the United States courts, alter a rule established by the United States Supreme Court. The Federal cases there cited do not in any respect alter the rule. The South Carolina case of *Lipe v. Carolina C. & O. Ry. Co.,* 123 S. Ct. 515, 116 S.E. 101, 30 A.L.R. 248, held that the courts of that state had jurisdiction of an action against a foreign corporation doing business in the state, a proposition not questioned here, but having nothing to do with the venue limitations of the Act of Congress.

The argument of the opening brief on this matter therefore remains unrefuted. There remains to consider the third point established in the opening brief.

PLAINTIFF FAILS TO ANSWER THE ARGUMENT OF THE OPENING BRIEF WHICH ESTABLISHED THAT DEFENDANT WAS NOT DOING BUSINESS IN IDAHO.

After analyzing all of the facts claimed to constitute the doing of business, the defendant on pages 20 to 35 of the opening brief discussed completely each class of act and furnished authorities holding that such acts did not constitute the doing of business within the state. None of the cases therein cited are even referred to in plaintiff's brief, nor is any attempt made to overthrow any of the sub-principles upon which the main principle is based. By this failure, plaintiff either admits the validity of the principles set forth in the opening brief or else it expects the members of this court to undertake the research and formulate the answering arguments which its counsel were unable or unwilling to undertake and formulate themselves. We will assume plaintiff did not expect the latter and it must therefore admit the validity of the arguments set forth in the opening brief as follows.

1. *Defendant was not doing business in Idaho* (p. 20 opening brief).

a. The solicitation in Idaho of orders to be confirmed outside of Idaho and filled from shipments from outside of Idaho does not constitute doing business in Idaho into which the goods are shipped (p. 20 of opening brief).

b. The sending of so-called "roller cars" into Idaho, and diverting them after arrival in Idaho

was not the doing of business in Idaho (p. 23 of opening brief).

3. The retention of title to merchandise held on consignment is not the doing of business in the state (p. 26 of opening brief).

d. The facts relative to the land held as security do not constitute the doing of business in Idaho (p. 32 of opening brief).

As a substitute for a direct answer and for a straight forward meeting of the issues, plaintiff on pages 9 to 14 of its brief sets forth, not in any logical order, eleven statements, which it contends govern the case.

It is probably better in this reply brief to follow the same order in discussing these points, although this plan will involve some repetition. Accordingly, these will now be discussed. In this discussion, attention will be called to the facts of the cases cited by Plaintiff, because the application of the rule announced is necessarily limited and affected by the facts to which the rule was applied.

1. The rule that less may be required to subject a corporation to service of process than is required to subject the corporation to the state's licensing and taxation statutes, does not settle the issue here. None of the cases cited in support of the rule state how much less or what is required, and all of them deal with situations where the corporation was unquestionably doing business, and was amenable to the licensing and taxation statutes of the state as well as to service of process.

Boise Flying Service v. General Motors Acc. Corp., 55 Ida. 5, 36 Pac. (2d) 813, deals with an entirely differ-

ent situation than that present here. In that case, the defendant admitted in several state court suits that it was doing business in Idaho, and falsely stated that it had complied with its laws, and was authorized to transact business therein. These were not statements of an alleged agent who might have been unauthorized but were the statements of its Assistant Secretary who was admitted to be authorized to act for it. Furthermore, there the defendant bought commercial paper in Idaho, repossessed radios, refrigerators and automobiles in Idaho, stored them in Idaho, sold them in Idaho, and maintained a representative who resided in Idaho. Obviously, there is no interstate commerce feature to any of these acts. Accordingly, this case furnishes no aid in the establishment of a rule applicable to the facts in issue here, and is of course limited to cases where similar facts exist.

It was anticipated in the opening brief that plaintiff would cite in its brief cases wherein the doing of business would be predicated upon the fact that the defendant carried stocks in a warehouse in the state, and it was stated in the opening brief that comment thereon would be reserved for the reply brief. Such a case was cited in support of the above alleged rule on page 9 of the plaintiff's brief, being the case of *Liquid Veneer Corp. v. Smuckler,* (9 C.C.A.) 90 F. (2d) 196. The defendant in that case always carried merchandise stocks on hand in the state and shipments were made from the warehouse in San Francisco, to customers in Los Angeles. Clearly, this was not an interstate commerce transaction, and clearly this was doing business in the state. This case, accordingly, is of no help.

The next case cited is *Denver & R. G. R. Co. v. Roller,* (9 C.C.A.) 100 F. 738. There the defendant maintained a business office in San Francisco with its name on the door. Of course, this constituted doing business in California. Numerous authorities could be cited to sustain that position, but likewise, the facts there are not similar to those in this case and afford no authority for this case.

The last case cited in support of that alleged principle is *Bendix Home Appliances v. Radio Accessories Co.,* (8 C.C.A.) 129 F. (2d) 177. On page 181 of the opinion, the statement is made that the evidence introduced at the trial has not been brought into the record, and the appellate court must therefore assume that the trial court's judgment is correct. Since this case fails to state the evidence upon which it was ascertained that the defendant was doing business, there are no facts which can be compared with the facts here to aid in the formulation of any applicable rule.

2. The next alleged rule is that a corporation is engaged in transacting business within the state if it transacts any business of any substantial character. None of the cases cited in support of this alleged rule refute the proposition that the business of a substantial character must nevertheless be business within the state, not interstate commerce business. If the business is interstate commerce it makes no difference how vast or substantial it may be. It still remains interstate commerce. Plaintiff cannot cite, and makes no attempt to cite, any authority to support the rule for which by implication it contends that a vast and extensive *interstate* commerce business becomes transformed into *intrastate* commerce

simply because it is vast and extensive in character. All of the cases cited in support of the rule asserted are cases where there is no question but that business was being done by the foreign corporation defendant in the state.

In the case of *Brown v. Canadian Pac. Ry. Co.,* 25 F. Sup. 566, the defendant brought suit in the United States Court for the Western District of New York in which Buffalo is located. The defendant ran its engines and cars into Buffalo, maintained an office in Buffalo with fourteen employees, and had its name on the door, and issued and sold tickets under its own name. Of course, this was doing business within the state, and of course this case is not applicable here.

The defendant in *Vilter Mfg. Co. v. Rolaff,* (8 C.C.A.) 110 F. (2d) 491, had offices in the state with its name listed in the building and telephone directories, which clearly constitute doing business in the state. This element being absent in the present case renders the cited case not in point.

The same is true of *Tauza v. Susquehanna Coal Co.,* 220 N.Y. 259, 115 N.E. 915. There a suite of offices and eight employees was maintained by the defendant, the defendant had its name on the door, and clearly maintained an office and was doing business. The facts in that case are likewise dissimilar.

3. Plaintiff's brief states that a corporation is present in any state where its officers or agents transact business in behalf of a corporation. This in effect is stating that a corporation is doing business in a state, when it is doing business in the state. This argument in a circle

is continued by the further statement that if the corporation is present in the state, process may be served on the officer or agent in charge of the business. As already indicated, the objection to service upon C. H. Kinney was made not on the ground that he would not have been a proper agent if the corporation had been doing business in the state, but that, because as set forth on pages 35 and 36 of the opening brief no person was a proper person when the corporation was not doing business in the state. This statement of law is therefore not applicable because the sole issue is "was the defendant doing business in Idaho." It is therefore unnecessary to discuss the cases cited in support of that principle.

4. The proposition stated under 4 is to the same effect. If the corporation had been doing business it may be conceded that C. H. Kinny would have been a proper agent for service of process but since the corporation was not business no one was a proper agent for the service of process in Idaho.

5. Proposition No. 5 stated on page 11 of plaintiff's brief can be assumed to be a correct statement of the law, but as above stated, if the corporation was not doing business in Idaho it makes no difference upon whom service was made, since under the Idaho statute nobody is a proper agent for service.

6. Proposition No. 6 stated upon page 12 of plaintiff's brief that one of the tests as to whether or not a corporation is doing business is whether its acts are sufficient to show an intent to make it an effective part of its field of operation in the business in which it was created, does not mean that the transporation of mer-

chandise in interstate commerce is doing business in the state nor that any of the other acts constitute doing business. Plaintiff does not attempt to explain the application of the rule to the facts in this case. That the acts done by defendant here do not constitute doing business is fully supported by the authorities set forth in the opening brief. The case of *Boise Flying Service v. General Motors Acc. Corp.,* 55 Ida. 5, 36 Pac. (2d) 813, which is cited in support of the above rule has already been discussed, and it has been shown that the facts in that case are entirely different, and the case furnishes no authority applicable here.

7. The statement that the fact that the business done by a corporation is interstate in character does not render it immune from process of the courts of a state, does not meet the issue in this case. The issue in this case is whether or not the defendant was doing business in Idaho so as to constitute a waiver of its rights to have the venue laid in the district of its residence or the district of the residence of the plaintiff, if an action should be brought against it in a United States court. The cases cited in support of the above rule throw no light upon this matter.

Can. Pac. Ry. Co. v. Sullivan, (1 C.C.A.) 126 F. (2d) 433, is a case where the defendant had appointed the Commissioner of Corporations as agent for service of process, and appointment had not been revoked. This is in accord with and not beyond the rule of the *Neirbo* case discussed in the opening brief, and the reasons why that rule is not applicable here are set forth on pages 15, 16 and 17 of that brief.

International Harvester Co. v. Kentucky, 234 U.S. 579, 34 S. Ct. 944, 58 L. Ed. 1479, is a case where the foreign corporation violated a criminal statute of the state and was prosecuted in the state court. The construction of the Act of Congress which governs this case was of course not discussed.

The case of *Boise Flying Service v. General Motors Acc. Corp.,* 55 Ida. 5, 36 Pac. (2d) 813, has already been discussed and shown to be inapplicable.

8. The principle that a foreign corporation may be sued on a transitory cause of action in any jurisdiction in which it can be found and service made is simply a statement that a foreign corporation may be sued in *any state court* of any state where it may be doing business, and where service may be obtained. The cases are all state court suits except *Vilter Manufacturing Co. v. Rolaff,* 110 F. (2d) 491, and this case was originally brought in the state court and removed to the United States court and the venue statute was therefore not applicable. Since these cases all relate to the rule in state court suits the *Keasbey* and *Old Wayne* cases discussed above (p. 4) are not and cannot be thus overthrown. As applicable to state courts, this rule may be conceded. The facts in the cases which support this rule will therefore not be discussed because not applicable.

9. The principle that a non-resident may bring an action *in a state court* in Idaho against a foreign corporation on a cause of action arising in another state, is not disputed but, of course, service must be obtained. This principle, however, does not controvert the rule respecting venue as set forth in 28 U.S. Code, Sec. 112, which

was construed in *Old Wayne Life Assn. v. McDonough,* 204 U.S. 8, 22; 27 S. Ct. 236, 51 L. Ed. 34. This rule is discussed on pages 16, 17 and 18 of the opening brief and page 4 above in this brief. This action having been brought in the United States Court is subject to that rule which has not been overruled.

10. The statement that the right to have the venue laid in the district of the residence of the plaintiff or the defendant may be waived, is conceded. Under the facts of the *Neirbo* case it was held that this waiver might be by conduct, the conduct in that particular instance being the appointment of an agent for service of process which was of course a consent to be there sued. In that case, as shown in the opening brief, pages 16 and 17, the agent was appointed, and also the cause of action related to property in the district. This argument of the opening brief is still not answered in plaintiff's brief. The facts in *Oklahoma Packing Co. v. Okla. Gas & Elec. Co.,* 309 U.S. 4, 84 L. Ed. 537, are the same as in the *Neirbo* case; there an agent for service for Oklahoma had been designated.

In *Schwartz v. Aircraft Silk Hosiery,* (2d C.C.A.) 110 F. (2d) 465, 31 F. Sup. 481, defendant maintained a sale's office. In *Ward v. Studebaker Sales Corp.,* (2d C.A.A.) 113 F. (2d) 567, the facts alleged to constitute the doing of business are not set forth, so that this case affords no standard of comparison.

11. The statement is made by plaintiff that it amounts to penalizing a law abiding corporation to hold that a corporation which appoints an agent is subject to suit in the state, whereas a foreign corporation doing business in defiance of the state's laws is not so subject.

While this statement may contain more of rhetoric than of logic, let us concede that the statement as made is a correct principle of law, it is nevertheless limited in its application to state courts. The right to sue a non-qualifying foreign corporation in the state is a right to sue in the state courts. This right exists under the laws of Idaho to sue in the state courts of Idaho. However, Congress has imposed limitations upon which United States District Courts shall have jurisdiction, and has stated that only the courts of the district wherein either the plaintiff or the defendant resides shall have such jurisdiction. Whatever the rights might be in the state courts, Congress has seen fit to impose venue limitations upon the United States courts. The *Neirbo case* states that such privilege conferred by Congress may be waived by appointment of an agent in a case wherein the relief requested was to enjoin the sale of property located in the district. None of such facts constituting a waiver are present in this case. There is no placing of a premium on outlawry by according to the alleged outlaw his right to refuse to waive a privilege merely because an allegedly lawabiding corporation chooses to waive its privilege. If the defendant here was engaged in doing business in Idaho the right to sue in the courts of that state is still limited to the state courts, and by the refusal of the defendant to waive its privilege to assert its rights with respect to venue as conferred by Act of Congress, such jurisdiction is denied to the United States courts. Many causes of action which are cognizable in state courts are not cognizable in United States courts, but such does not constitute the penalizing of lawabiding citizens nor the placing of a premium upon outlawry.

DISCUSSION OF ARGUMENT OF PLAINTIFF'S BRIEF

Under the heading "Argument" commencing on page 14 plaintiff states that the defendant "seems to question the propriety of the summary judgment." The discussion of summary judgment in the opening brief commencing at page 14 stated the rule that where there is some discrepancy or uncertainty in the evidence, the position most favorable to the party against whom the summary judgment is entered must be accepted as true. Plaintiff summarizes the pleadings and the circumstances under which the summary judgment was entered but gives no authority nor any good reason why the rule as stated in the opening brief is not correct. In determining the question as to whether defendant waived its right to object to the venue of the action, the above rule set forth in the opening brief respecting summary judgments must be kept in mind.

Commencing on page 17 of the plaintiff's brief the evidence is reviewed. There is no new matter presented in the re-statement of the evidence; the statement in the opening brief was full and complete and stated every fact which is merely repeated in the plaintiff's brief. One erroneous statement appears on page 17 of plaintiff's brief which is that clearly all the witnesses were officers or representatives of defendant. This is inaccurate because customers who purchase merchandise are not representatives of the seller of the merchandise.

The plaintiff then attempts to make a big point out of the fact that the agreement between defendant and its customers could not be found. In the opening brief how-

ever it is assumed that such agreement would show a consignment contract which is what plaintiff contends it was. Nevertheless the plaintiff makes no effort to refute the argument that the shipping of goods into the state under a consignment contract if it was such a contract does not constitute doing business in the state into which the goods are shipped. The argument on pages 26 to 32 of the opening brief therefore still stands.

In the review of the evidence the plaintiff refers to testimony wherein the parties appeared to consider the relationship to be one involving the shipment of goods on consignment. Despite the ideas of the parties as to where the title to the merchandise may have vested it is doubtful if the arrangement between them constituted any title retention contract. Defendant is, of course, not bound by any answer which a garnishee may have made as to the ownership of the baskets. The evidence as shown in the opening brief indicates that the customer bought the baskets and retained the title although the date of payment of the account was postponed until the following season if the baskets were not sold. In connection with the testimony, the witness said:

> (P. 129) "Q. Well, let me put it this way, Mr. Hogue: If you actually bought these baskets at the price according to that invoice, do I understand that they could later increase that price?
>
> "A. Well, I really don't know. They would send me a price list to resell at, but whether they would raise my cost—that what you mean, I guess—I don't know, because it hasn't come up."
>
> (P. 140) "Q. Well, now, do you know whether—

say they raised the price on the ones you have now, do you know what your settlement will be with Cummer-Graham, whether you will still settle with them at the price at which they are charged to you now, or whether you would settle with them at an increased price?

"A. On the inventory I have now?

"Q. Yes.

"A. No, I don't know, because it's never happened."

Accordingly, whatever conclusions of law the witness might have had in his testimony, eventually boils down to the statement that he "does not know."

On page 28 of the plaintiff's brief a statement is made concerning the alleged consignment contracts, that the parties to the contracts claimed only a vague recollection as to the terms. It goes without saying that jurisdiction cannot be predicated upon vagueness.

There is no authority cited to overthrow the rule stated and discussed on pages 32 to 35 of the opening brief regarding the alleged security held upon real estate not constituting the doing of business. As shown in the opening brief the fact that credit may have been extended to the mortgagor or to the successor trustee who stepped into his shoes makes no difference in the rule.

It appears possible that there was one exception out of two hundred cars a year where the so-called "rollers" were shipped to defendant in Idaho not in care of any distributor. However, this car found its way into the hands of the distributor, Hogue, and the mere fact that

a shipper in Georgia consigned the car in that manner is of no significance, and binds nobody but him, and the argument in the opening brief concerning rollers found on pages 23 to 26, and the two United States Supreme Court cases therein cited are in no manner affected by that circumstance. No attempt is made to overthrow the authority or applicability of such cases.

Plaintiff appears to lay great stress upon the "very extensive" business done by defendant in Idaho. The size or volume has nothing to do with the character. If it is local it constitutes doing business even though it is small. If it is not local, but under interstate commerce with no merchandise warehoused in the state, no office maintained there, no goods purchased there, and if the solicitation is all for the purpose of making sales to be approved, sold and delivered in interstate commerce as the uncontroverted evidence in this case shows that it was, the volume of the business does not determine the local or interstate character and has nothing to do with the issue.

The argument is made in the plaintiff's brief that the evidence of defendant's officers is not worthy of belief because it is "strange," and that the manner of handling their business was a subterfuge to avoid the laws of the State of Idaho. Both are unsupported statements of conclusions. If defendant's officers did not speak the truth, plaintiff's remedy was to have the matter set for trial and establish the falsity of their statements. A motion for the summary judgment is not properly granted upon a presumption that the evidence of the party against whom it is granted is "strange" and therefore unworthy of belief, or that a subterfuge exists where there is no

irregular practice or evidence of an improper motive; but on the contrary, where the reasons for acting are perfectly normal and reasonable.

Commencing on page 37 of plaintiff's brief, considerable space is devoted to the proposition that C. H. Kinney was a representative of importance and a proper person upon whom to make service of process. It is not controverted that if defendant was doing business in Idaho he would have been a proper person to serve, but doing business in Idaho under the Idaho statute cited on pages 35 and 36 of the opening brief is a necessary element for service upon anybody. The dignity or importance to C. H. Kinney is not the issue.

There is nothing abnormal or unreasonable in the method of shipping roller cars into Idaho nor in the granting of extension upon payment of accounts receivable.

Commencing on page 40 of plaintiff's brief it is asserted that the use of the roller cars is a subterfuge, and that the charges made to the customers are fictitious charges, which if there were no original authority for the shipment, which is not shown, the shipment was at any rate ratified by acceptance of the rollers, and there appears to have been no complaint about payment for them nor any refusal to make payment, nor any evidence that payment was not made, so that such transaction can hardly be called fictitious. The reason given was a good reason, but even if not good, would not transform an interstate shipment into an intrastate shipment.

It may be conceded that under the laws of Idaho a non-resident may bring an action against a foreign cor-

poration upon a cause of action not arising in Idaho, and that jurisdiction in the state courts of Idaho could be acquired by attachment. Nevertheless, the United States courts possess only such jurisdiction as is conferred upon them by Congress, and because action might have been brought in the state court of Idaho by attachment does not indicate that it may be brought in the United States District Court for the District of Idaho.

Jurisdiction cannot be conferred by attachment in the United States courts. This was established by *Big Vein Coal Co. v. Read,* 229 U.S. 31, 37; 33 S. Ct. 694, 57 L. Ed. 1053, which says:

> "It was further held that an attachment was but an incident to a suit and unless the suit could be maintained the attachment must fall. In other words, in cases where the defendant could not be sued and jurisdiction acquired over him personally, the auxiliary remedy by attachment could not be had, as attachment was not a means of acquiring jurisdiction. . . .
>
> "The argument is that the right to issue an attachment under the act of 1872 should obtain, since the law now permits suit in the district of the residence either of the plaintiff or defendant, omitting the provision of the act of 1875 that the defendant could be sued only in the district in which he was an inhabitant or could be found at the time of commencing the proceeding. But we are of the opinion that this amendment to the statute was not intended to do away with the settled rule that, in order to issue an attachment, the defendant must be subject to

> personal service or voluntarily appear in the action. If Congress had intended any such radical change, it would have been easy to have made provision for that purpose, and doubtless a method of service by publication in such cases would have been provided. We think the rule has not been changed; that an attachment is still but an incident to a suit, and that, unless jurisdiction can be obtained over the defendant, his estate cannot be attached in a Federal court.''

The *Neirbo* case, contrary to plaintiff's statement, does not establish any ''broad'' rule. It holds that the privilege of objecting to improper venue is waived by appointment of an agent in the state upon whom process may be served in a case where the cause of action is to enjoin sale of property in the district. Neither of these elements is present in this case, and the rule of *Old Wayne Life Insurance Association,* 204 U.S. 8, 22; 27 S. Ct. 236, 51 L. Ed. 345, has not been abrogated, and still governs this case. The cases recited on page 43 which plaintiff says abrogates the rule, all involve situations where offices were maintained in the state. Furthermore, the *Old Wayne* case is a decision of the United States Supreme Court and cannot be overruled by lower Federal Courts nor by the Supreme Court of South Carolina. The limitations upon the scope of the *Neirbo* rule are found on pages 16 to 18 of the opening brief, and will not be here repeated.

The differences between the facts of this case and that of *Boise Flying Service v. General Motors Acc. Corp.,* 55 Ida. 5, 36 Pac. (2d) 813, has already been dis-

cussed, and the case of *Lipe v. Carolina C. & O. Ry. Co.*, 123 S. Car. 515, 116 S.E. 101, 30 A.L.R. 248, is a case where the Railroad Company, defendant, was clearly doing business in the state. All that that case holds is that the state court has jurisdiction. As above indicated, that does not mean that the United States Court sitting in the state has jurisdiction if the privilege of objecting to the venue is asserted as it is here.

There can be no controversy concerning the proposition that if a foreign corporation maintains an office in a state it does business in the state, and must comply with the laws of that state, and is subject to suit therein. However, it has not been the law heretofore, and is not the law now that the solicitation of sales in interstate commerce by a jobber or manufacturer not having an office in the state and shipping all of its goods into the state constitutes doing business in the state into which the goods are shipped, nor has it been the law, nor is it now, that the shipment of goods on consignment alters the above rule, nor that the taking of security or the collection of accounts receivable constitutes the doing of business. If this court affirms the decision of the trial court, the above rule is altered, then Cummer-Graham Company and every corporation doing business in the normal manner in which Cummer-Graham Company did business, must qualify as a foreign corporation in every state in which their salesmen enter. This has not been the law heretofore, and is not the law now, and business methods have grown up in reliance upon this situation. Cummer-Graham Company, as the evidence shows, solicits orders and ships merchandise into twenty-six states in interstate commerce. The volume is not as large in

all states as in Idaho, but there cannot be one rule where the volume is large, and another rule where it is small. The *Neirbo* rule does not extend to cover this case and there is no reason why the rule should be so extended.

CONCLUSION

The brief of plaintiff does not comment on a single case cited by defendant nor does it overthrow any of the rules set forth in the opening brief, nor present any facts not recognized by the opening brief to exist, nor show why any of the cases cited in the opening brief are inapplicable.

The judgment of the trial court should be reversed.

Respectfully submitted,

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